No. 89-7370

In The

# Supreme Court of the United States

**October Term, 1990**

MOSHE GOZLON-PERETZ,

*Petitioner,*

v.

UNITED STATES,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## REPLY BRIEF FOR THE PETITIONER

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## REPLY BRIEF FOR THE PETITIONER

On resentencing after affirmance of petitioner Gozlon's convictions for heroin offenses committed in February 1987, the district court imposed concurrent special parole terms of five years each on the two substantive counts. The court also imposed 15 years' imprisonment on Counts 2 and 3 for possession and distribution, and 20 years for conspiracy on Count 1, all concurrent, as well as

a fine of $200,000 on Count 3. J.A. 18.[1] On appeal after remand, the court of appeals held that the lower court had erred in imposing special parole terms, but remanded for the imposition of terms of supervised release.[2] *United States v. Gozlon-Peretz*, 894 F.2d 1402, 1404 (3d Cir. 1990); J.A. 43-53.[3]

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[1] Contrary to the respondent's counterstatement of the case, Resp. Br. 4, this was not the petitioner's "initial[ ]" sentence. *See* Pet. Br. 2-3 and appendix references found there for an accurate statement of the procedural history of the case.

[2] Contrary to respondent's brief, the court of appeals did not "order[ ] the district court to redesignate petitioner's five-year term of post-confinement monitoring as 'supervised release' rather than 'special parole.' " Resp. Br. 4; *compare* J.A. 53. The district court would be free, if the judgment below were affirmed, to impose any lawful terms of supervised release that did not create an appearance of vindictiveness. *Texas v. McCullough*, 475 U.S. 134 (1986); *Wasman v. United States*, 468 U.S. 559 (1984).

[3] The split in the Circuits continues. Compare *United States v. Hessen*, 911 F.2d 651 (11th Cir. 1990) (per curiam) (sentence to supervised release vacated and case remanded for imposition of special parole for possession of unspecified quantity of cocaine in October 1987, although said in fact by defendant to exceed one kilogram and thus to be subject to no extra supervision under pre-ADAA law), with *United States v. Blackmon*, 1990 WestLaw 133509 (6th Cir., filed Sept. 19, 1990) (agreeing with Third Circuit decision in the instant case, describing that court as having "corrected this congressional oversight").



## ARGUMENT IN REPLY

### A TERM OF SUPERVISED RELEASE MAY NOT BE IMPOSED AS PART OF THE SENTENCE FOR CONTROLLED SUBSTANCES OFFENSES COMMITTED BEFORE NOVEMBER 1, 1987, WHEN THE LAW PROVIDING FOR SUPERVISED RELEASE BECAME EFFECTIVE.

Petitioner Gozlon's position in this case begins from the simple premise that a statute that does not state its effective date requires judicial construction when that date becomes an issue in a case. While that question of construction is often easily answered by reference to the presumption that a statute is ordinarily deemed effective immediately upon its being signed by the President, that "rule," like any other axiom of construction, may be overcome or displaced by a compelling marshaling of evidence from the language, structure, purpose and history of the same and related statutes, taken in the light of other applicable rules of construction. See *Gardner v. Barney, Collector*, 6 Wall. (73 U.S.) 499, 511 (1868).[4] The petitioner's argument follows this method to demonstrate that the supervised release provisions of the Anti-Drug Abuse Act of 1986 were effective only for offenses committed on or after November 1, 1987, when the Sentencing Reform Act provisions governing the imposition, content, carrying out, and revocation of supervised release went into effect.

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[4] Respondent's brief makes no mention of this case, which appears to be the only one in the Court's history to address the issue, and with which the petitioner begins his discussion. *See* Pet. Br. 12-13.

The argument for the United States, on the other hand, apparently proceeds from the suggestion that legislative silence as to a statute's effective date is a kind of "plain language" which adopts *sub silentio* a "rule" of immediate effectiveness. Resp. Br. 11.[5] The respondent does not actually rely on that position, however, as its brief goes on to attempt to address most of the arguments made by the petitioner. The respondent's answers, however, are not persuasive.

**1. The Term "Supervised Release," as Used in the 1986 Anti-Drug Act, Was Meaningless Without the Simultaneous Existence of the Supervised Release Provisions of the Sentencing Reform Act.**

The principal fallacy of the respondent's position is revealed on page 23 of its brief. The United States concedes that 18 U.S.C. § 3583, which defines and governs

[5] The court of appeals cases cited by the respondent for the proposition that only an "express provision to the contrary" can override this "rule" of construction offer only *ipse dixit* in its defense; none of them deals with any effort to override the presumption on the basis of other evidence of the statute's meaning, as here. This Court has never so much as hinted that statutory language must be "express" to overcome the presumption, and *Gardner v. Barney, supra*, is to the contrary. Nor does the citation to *Arnold v. United States*, 9 Cranch (13 U.S.) 104, 119-20 (1815), Resp. Br. 10, add anything to the discussion. That case addresses the question whether a law expressly providing that it shall be effective "from and after" a date which is not in dispute is effective on that very day, or only beginning on the next day; *Arnold*, although often cited for the proposition at issue in this case, is actually irrelevant to it.



the "unique and novel concept," *Bifulco v. United States*, 447 U.S. 381, 390 (1980), of supervised release, "was not in effect during" the October 1986 to November 1987 time period when this petitioner's offenses were committed and that sentencing courts were thus not "strictly bound" by its provisions. Resp. Br. 23. Yet if courts were not bound by the restrictions of § 3583 in imposing terms of "supervised release" prior to November 1, 1987, then the respondent must be arguing that Congress called upon judges to impose a kind of criminal sentence of no defined meaning.

Neither ADAA § 1002 nor any other law even arguably effective prior to November 1987 limited a judge in any way as to who or what agency would perform the supervision, where the released person would be supervised, whether that term would run concurrently or consecutively with the defendant's "mandatory release" under 18 U.S.C. §§ 4163-4164 (repealed effective November 1, 1987),[6] what conditions of release might apply,

[6] Under those provisions, a prisoner such as the petitioner, serving a sentence for an offense committed before November 1, 1987, who is ineligible for or is not granted parole is released after service of the full term of the sentence, less deductions for good conduct awarded under *id.* §§ 4161-4162. For the duration of the full term less 180 days, that person is supervised by agents of the U.S. Parole Commission "as if on parole." Similarly, the respondent admits that under its construction of the 1986 Act an offender could end up on both supervised release and parole for the same violation of 21 U.S.C. § 845a(a), Resp. Br. 19 n.9, suggesting that the two forms of supervision are "not irreconcilable," even though one was created for the sole purpose of displacing the other.

what the consequences of violation might be,[7] how the fact of violation would be determined and by whom, or any of a host of other practical problems. A provision for criminal punishment that is so completely free of definite or uniform meaning would surely be unenforceable, if not unconstitutional.[8] It should not lightly be presumed that Congress intended to establish such an unprecedented, free-floating penalty.

In addition, the respondent understates the implications of its contention. The theory that Congress granted unconstrained discretion to each sentencing judge to define "supervised release" for him- or herself would not be limited to sentences imposed prior to November 1, 1987. Although it is true that there would be "no *ex post facto* problem," Resp. Br. at 24 n.10, in applying the procedural aspects of § 3583 to sentences imposed after

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[7] The respondent suggests that pre-November 1, 1987, supervised release, like any other court order, would be enforceable by contempt of court proceedings. Congress initially had the same idea, but soon thought better of it. *See* Pet. Br. 23 n.12; *compare* Resp. Br. 24 n.11 (erroneously stating, without citation, that this change occurred in 1986). Contrary to the respondent's suggestion, *id.*, the idea that Congress intended the possibility of life imprisonment without parole to be available under the provisions of 18 U.S.C. § 401(3) for supervised release violators is indeed "anomalous."

[8] A criminal law which in effect gave judges power to sentence in their uncontrolled discretion would surely violate the due process clause and the separation of powers (by delegating a legislative function). Moreover, the respondent's suggestion that Congress intended such sentencing is inconsistent with the entire philosophy behind the 1984 Sentencing Reform Act. *See Mistretta v. United States*, 488 U.S. 361 (1989).



November 1, 1987, for offenses committed before that date (nor did the petitioner's brief suggest otherwise), such application would nevertheless be impermissible on statutory grounds. As noted in our opening brief, at 23 n.12 (but ignored by the respondent) Congress explicitly prohibited judges from using § 3583 for pre-1987 offenses. Pub.L. 100-182, § 2(a); Pet.Stat.App. 50.[9]

The parties are in agreement that Congress, at the last moment, decided to substitute the phrase "term of supervised release" for the phrase "special parole term" in § 1002 and other similar provisions of the ADAA. It is not known why. Construction *in pari materia* with the Sentencing Reform Act,[10] not to mention the argument from necessity made above, suggests that Congress resolved not to perpetuate the regime of parole, including "special parole," which it had already determined to

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[9] "Pet.Stat.App." means the appendix of statutes bound with petitioner's brief. Congress declared that the Sentencing Reform Act, of which § 3583 is a part, "shall apply only to offenses committed after the taking effect of this chapter," *i.e.*, November 1, 1987. Thus, the respondent's discussion of why there is no real "problem," Resp. Br. 23-24, which depends on invoking § 3583 for a pre-1987 offense, misses the mark.

[10] We never suggested, much less made it the "premise" of our argument, that § 3583 was the source of "power" for the imposition of supervised release in a drug case. *Compare* Resp. Br. 22 *with* Pet. Br. 42 (phrase "general power . . . to impose supervised release" refers to authority to impose it as part of any felony sentence under the SRA, as opposed to specific grant of power in 21 U.S.C. § 841(b), as amended). Section 3583, however, is a necessary source of standards for controlling discretion in the imposition of supervised release and of procedures for implementing it.

abolish, but decided instead to integrate the penalty provisions of the 1986 Act with the new sentencing law which would be going into effect in just about one year.

The respondent points out that § 1002 has no effective date language itself, while other sections of the same statute do, inferring from this fact that § 1002 must not have been intended to become effective on a later date. Resp. Br. 12. The cases cited by the respondent in support of this approach did not involve provisions that work together and must be construed *in pari materia*. In that situation, as exists here, it is not necessary for Congress to repeat the effective date language in every section. The history of the Sentencing Reform Act shows that Congress well understood the difficulty of making even urgently desired changes in sentencing laws immediately. Thus, there is nothing remarkable about the conclusion that provisions of the 1986 Act would not become effective until November 1987.

After unusually thorough and praiseworthy deliberation, Congress determined in 1984 that a two-year period (later extended to three) would be needed to make the transition to the new system, and so established a delayed effective date of November 1, 1987, for "new law" sentencing. *See* Pet.Stat.App. 13, 21. There is not a word of legislative history to suggest that in 1986 Congress *sub silentio* rejected the fruits of this process and decided instead to accelerate by one year the effective date of supervised release,[11] in such a way that numerous

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[11] The snatches of legislative history (remarks of Senator Dole) cited by both parties; Pet. Br. 39 n.25, Resp. Br. 9, 13; show at most that the leadership of Congress wished to enact the anti-drug bill before the Election Day recess. They do not reveal anything substantive about the content or meaning of the bill itself.



other provisions of the Act would be rendered self-contradictory and the supervised release provision itself would be left devoid of meaning. It is much more reasonable to infer that Congress decided at the last moment to conform the drug bill better to the impending process of sentencing reform and to have at least the ADAA's supervised release provisions go into effect only for offenses committed on or after November 1, 1987.

**2. All of the Penalty Provisions of the 1986 Act Went into Effect on November 1, 1987.**

The respondent's assertion "that Congress wanted all the penalty provisions in Section 1002 to go into effect at the same time" is not "[c]ontrary to petitioner's contention." Resp. Br. 16. In fact, we advance the same contention, only arguing for a November 1, 1987, common date, based on the relationship between ADAA § 1002 and sections 1007 and 1009 of the same Act. Pet. Br. 24-28. Respondent's attempt to argue against this construction by means of what amounts to "subsequent legislative history," *see* Resp. Br. 14; *Sullivan v. Finkelstein*, 496 U.S. ___, 110 L.Ed.2d 563, 575 n.8 (June 18, 1990), must avail it nothing. Moreover, it is simply untrue that this argument has been "rejected by every court that has considered it." Resp. Br. 12. To the contrary, *United States v. Preston*, 739 F.Supp. 294 (W.D. Va. 1990) (*see* Pet. Br. 27), adopted precisely this argument after full analysis.[12]

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[12] None of the court of appeals cases cited in Resp. Br. 12 n.2 considered the argument advanced in petitioner's opening brief. Those cases assert that the effective date of the ADAA's

(Continued on following page)

It is odd that respondent describes this argument, which follows a different and much more extended argument in support of our position, as being how our brief "begins." Resp. Br. 11. Instead, we began, as did the respondent, with a discussion of the axiom of construction, and do so again in this Reply. We then proceeded into a detailed analysis of the language of the Anti-Drug Abuse Act of 1986, revealing half a dozen or more ways that provisions of the Act are rendered contradictory or meaningless by the respondent's theory. Pet. Br. 14-24. Thus, it is equally odd to find the respondent asserting that the 1986 Act "nowhere indicates" a later effective date. *Id*. at 8; see also *id*. at 12 ("nothing in . . . the 1986 Act that suggests" later date). Those eleven pages of our brief discuss numerous such "indicat[ions]" in detail. The respondent attempts later in its brief to brush these off as "drafting errors" and "mismatched cross-references," Resp. Br. 25 n.12, because its theory of immediate effectiveness cannot explain them.

The respondent also suggests that Congress's use of express no-parole language in § 1002 and related sections of the 1986 Act shows that these provisions were intended to go into effect immediately, because parole was already set to be abolished as of November 1, 1987, by virtue of the Sentencing Reform Act. Resp. Br. 15 n.4.

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non-parolable and mandatory minimum penalty provisions was October 27, 1986, but most of them cite only the earlier cases on that list and none discusses the implications of ADAA §§ 1007 and 1009. In opposition to those cases, *see Hernandez Rivera v. United States*, 719 F.Supp. 65 (D.P.R. 1989).



This argument proves too much. The 1988 Anti-Drug Abuse Act amended 21 U.S.C. § 845a while leaving intact language barring parole during service of the mandatory minimum term which was at best equally "unnecessary . . . surplusage," as is the meaningless language left by Congress in *id*. § 845b after its 1988 amendment. Pub.L. 100-690, §§ 6458, 6459, 102 Stat. 4373. Indeed, the same surplusage remains to this day throughout §§ 841(b) and 960.

Accordingly, for the reasons set forth in our opening brief, the supervised release provisions of ADAA § 1002 did not become effective until November 1, 1987, because that was the effective date of the entire section.

### 3. A Silent Statute Is an Ambiguous Statute, as Is a Contradictory One; Thus, the Rule of Lenity Applies.

This Court has apparently never in its history had to resolve a question of when a statute became effective. The closest analogous precedent, however, is clearly *Bifulco v. United States*, 447 U.S. 381 (1980), as discussed throughout the petitioner's brief. Yet the respondent manages not even to mention the majority opinion in that case. Instead, it invokes uncontroversial but inapt phrases to deflect the petitioner's argument based on the rule of lenity. Nothing in the petitioner's brief could be construed as invoking the rule of lenity "at the beginning as an overriding consideration" nor as seeking to use the rule "to beget [an ambiguity]." Resp. Br. 26.

There is ambiguity here because § 1002 does not say when that amendment is to be deemed effective, at least as to its supervised release provisions. Moreover, inferring a

last-moment one year acceleration of the long-planned 1987 commencement of supervised release generates what the respondent admits are "many . . . anomalies," "incongruities,' and "statutory mismatches," Resp. Br. 20, 21, 25 n.12, which the respondent gamely defends as "not . . . absurd." *Id.* at 10. These "internal inconsistencies" must be "dealt with," not ignored. *United States v. Turkette*, 452 U.S. 576, 580 (1981). As demonstrated in our opening brief, these problems can be virtually eliminated by the construction of the statute advanced by the petitioner, under which all supervised release provisions became effective on November 1, 1987, which the respondent admits would be "more symmetrical." Resp. Br. at 22. The respondent's interpretation would borrow trouble for numerous future cases by carving the contradictions in stone. Resp. Br. at 25 n.12.

Certainly, § 1002 of the ADAA shows that Congress in 1986 reversed its determination of 1984 to eliminate special parole for higher volume drug offenders. The question, however, is whether it intended to do so immediately, even at the expense of upsetting the timetable for sentencing reform, including the innovation of supervised release, that was already well under way and scheduled for implementation in just a year, on November 1, 1987. The change back to extended supervision in § 841(b)(1)(A) cases was not a highlight of the 1986 bill, to put the matter mildly; it received not a mention in the legislative history. It was simply not an issue of importance to Congress. Violators in the petitioner's category, like those convicted under 21 U.S.C. § 846 of conspiracy or attempt as interpreted in *Bifulco*, were not subject to special parole after the 1984 amendments. To continue that situation for another year, while such offenders were



still subject to parole in conspiracy cases and mandatory release supervision on all counts, was not too high a price for Congress to pay for a smooth transition to supervised release, as had been long planned, under the regime of the Sentencing Reform Act.

Finally, the respondent seems to be trying to leave room in its argument for a suggestion that if supervised release cannot be imposed here, then somehow the Court should order restoration of the petitioner's special parole terms. Resp. Br. 18, 20-21, 26-27. Not only was that possibility excluded (at the respondent's suggestion) from the question on which certiorari was granted, it has no basis in any statutory language. When and how to "fix" statutory "gaps" or even "errors" is Congress' business, not the courts'. This Court emphatically and properly recognized that principle in *Bifulco* and must apply it again here.

Assuming his sentences are not vacated entirely for the reasons discussed under Point 2 above, petitioner Gozlon will be under ordinary parole supervision for about ten years when released from imprisonment under his 20-year sentence on Count 1; he will also be treated "as if on parole" for about the first five of those years when mandatorily released from confinement on Counts 2 and 3. For all the many reasons discussed in our brief on the merits and in this reply, however, he is not additionally subject to either special parole or supervised release.

## CONCLUSION

For all of these reasons, and for the additional reasons discussed in the petitioner's opening brief, terms of supervised release may not be imposed as part of the sentence in this case, because the law creating that penalty was not yet effective at the time of commission of the offenses. The judgment of the United States Court of Appeals for the Third Circuit should be affirmed insofar as it vacated the special parole terms imposed on resentencing by the district court, but reversed to the extent that it remanded for imposition of terms of supervised release.

Respectfully submitted,

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